FOR ARGUMENT

Nos. 78-432, 78-435, 78-436

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IN THE

Supreme Court of the United States

October Term, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
v.
BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Petitioner,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
v.
BRIAN F. WEBER,
Petitioner,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
v.
BRIAN F. WEBER, ET AL.,
Petitioners.
Respondent.

REPLY BRIEF FOR UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

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ARGUMENT

Ironically, both of our fellow petitioners in this Court argue for a construction of Title VII which would invalidate "affirmative" action as the United Steelworkers of America ("USWA") understands the term (and would only permit quotas to end a racial imbalance as "defensive" or "remedial" action). As the Government puts it, Title VII does not "permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act" (Govt. Br. 29), and accordingly privately adopted quotas should be "subject to . . . scrutiny, so as to ensure that the programs are reasonably tailored to the apparent violation that they are designed to remedy" (*id.* at 40; see also, *id.* at 17, 19, 21). In the Company's words, Title VII would not permit employers to adopt quotas to eliminate racial imbalance "without cause or for purely altruistic reasons" (Co. Br. 32), but only to "remedy identified discrimination" (*id.* at 30, 32).

We show in Part II of this reply that the Government and the Company do not derive these concessions from any

analysis of the governing legislative materials. Rather, each constructs an argument from whole cloth which is contrary not only to the legislative materials but, as we show in Part III, to logic and common-sense.[1] In the course of Part II, we also reply to the short argument Respondent has addressed to our opening brief. Before doing so, and having read with interest the assessments offered by the myriad parties and *amici curiae* as to the impetus for the Union's entering into the agreement struck down by the courts below, we think it appropriate to begin with a statement in that regard of our own.

[1] The Government is in error in suggesting that USWA's position in the Fifth Circuit can be equated with the Government's position in this Court. (Govt. Reply Br. 6-7).

First, USWA's brief to the court below began by noting that § 703(j) on its face appears to validate quota programs to eliminate racial imbalance regardless of the cause of the imbalance and that *McDonald* v. *Sante Fe Transportation Co.*, 427 U.S. 273 (1976), does not preclude such a reading of the statute. (Brief for Defendant-Appellant USWA in C.A. 5, No. 76-3266 at 13-14). Thus the Union did not make the critical concession the Government makes here.

Second, in the Fifth Circuit, USWA did go on to develop an alternative analysis derived from the numerous Fifth Circuit decisions approving broad quota remedies. USWA expressly noted its doubts as to the correctness of those decisions (*id.* at 21), observing that "the tide appears to be turning against remedies which extend priorities to employees who were not personal victims of discrimination" (*id.* at 25); indeed, USWA predicted that the Fifth Circuit's decisions might no longer be viable after this Court decided *Teamsters* v. *United States*, 431 U. 342 (1977), (which was then pending on a grant of certiorari). But taking the circuit law as it stood, USWA agreed that private parties in the Fifth Circuit surely were entitled to adopt voluntarily those remedies which the Fifth Circuit would impose upon them.

Consistent with the approach just outlined, USWA stated below that the "ultimate question" presented was

> "[T]o the extent that the 1974 agreement enables junior black employees to secure training vacancies ahead of more senior white employees, does the agreement discriminate against whites because of their race in violation of Title VII?" (USWA's brief in C.A. 5, No. 76-3266 at p. 2).

What the Government in its Reply Brief at (p. 6) characterizes as "the question" the Union presented below was in fact one of five "subsidiary questions." Before the Fifth Circuit decided this case, this Court decided *Teamsters*, and as USWA had predicted, declared that the "make whole" remedial scheme of § 706(g) is addressed to "identifiable victims." And the court below in fact reached and decided this case on the basis of § 703(j). Thus, the question presented to *this* Court is the one stated at p. 1 of our opening brief.

I.

In 1974, USWA embarked upon a nationwide program to eliminate a form of racial segregation which existed throughout the industries whose employees USWA represents: the near absence of blacks from craft jobs. The Union did not undertake this program in response to any past discrimination by USWA; indeed, as the record of this case exemplifies, the employers in these industries have historically had unilateral control over the selection of craftsmen, and USWA had sought for years, albeit unsuccessfully, a negotiated selection system which would have opened these jobs to blacks.[2] Significantly, although the parties debate whether Kaiser might conceivably have discriminated in the past in filling craft jobs (Govt. Br. 42-48; Co. Br. 47, n. 122; Resp. Br. 58-70), no party suggests that USWA was culpable in any respect.

Nor was the program undertaken solely in response to past discrimination by the employers with whom USWA deals. Without studying the specific causes for the absence of black craftsmen at given plants, USWA acted on the

[2] Well before 1974, USWA had persuaded most of the major employers with which it deals to institute in-plant craft training programs open to all employees based on seniority. Kaiser was an exception in that until 1974 it continued to select its craftsmen "off the street". For years, USWA had urged Kaiser to establish in-plant training programs which would have enabled the incumbent production workers—white and black—to become qualified for craft positions (Un. Br. 6-12).

assumption that the causes were multiple and might well differ from employer to employer, plant to plant, and geographic area to geographic area—often, as the courts below found was the case here, tracing back well beyond the conduct of the employer to external societal factors.

USWA's advocacy of the affirmative quota selection plan thus stemmed not from any concern that the union might be legally vulnerable for the existing segregation in craft jobs, nor that the employers with which it deals were invariably vulnerable. Rather, USWA acted to end that situation regardless of its cause.[3] Respondent's charge that USWA's actions reflect a desire "to help uplift the employment status of minority workers as a class" (Resp. Br. 14) is justified, but it is not accurate to characterize those actions as "altruistic" (cf. Co. Br. 32). Rather, USWA acted on principles which properly underlie all actions of unions in their representational status: maximizing the collective interests of the employees they represent. Regardless of the cause, the fact of in-plant racial segregation, superimposed upon two centuries of endemic racial discrimination at all levels of society, fosters a *perception* of present racial injustice which is injurious to employee morale and union solidarity. Of course, USWA recognized that undertaking a quota program to eliminate that segregation might create short-term strains of the type evidenced by this lawsuit (ameliorated in the particular circumstances here because the program created opportunities for both black and white USWA members which neither would have en-

[3] The Union's actions thus coincided with the sentiment expressed by Senator Humphrey in his principal statement in support of the bill, 110 Cong. Rec. 6548.

> "It profits little to attempt to calculate how much the disparity in employment opportunities for whites or for nonwhites is ascribable to outright discrimination in employment, how much to discrimination in education, how much to discrimination in the present, and how much to the legacy of discrimination in the past. The problem is before us and the solution calls for action, not explanations."

joyed otherwise). But it was USWA's assessment that the long-term gains from a *temporary* program of this sort would outweigh any short-term costs.

We italicize the word "temporary" to assure that there is no misunderstanding as to the nature of the program at issue. Respondent's brief states that the 1974 agreement mandates quota selection even after the existing imbalance has been eliminated (Resp. Br. 4). But the 1974 agreement expressly provides that this procedure shall apply only "until the goal is reached" (App. 137, 145, 168). Thus the program is addressed to *eliminating an existing racial imbalance,* not to establishing racial balance as a permanent criterion.[4] What is at stake here is the legality of this program and not the legality of a program which establishes a racial quota as a permanent selection criterion.

Perhaps other institutions would have struck the balance differently; but it is USWA's position in this case that Congress left to the parties in collective bargaining the option to affirmatively attack existing patterns of segregation, and did not take from them the freedom to do so which they indisputably enjoyed prior to 1964.

II.

Because the question presented is the meaning of a statute, we continue to believe—contrary to those who have sought out other sources of possible enlightenment—that the answer is to be found through a close reading of the language and the legislative history of that statute. The Company, the Government, and many of the *amici curiae,* ignore these primary sources and construct their respective

[4] Respondent's contrary construction is based exclusively upon the testimony of Dennis English, the Company's superintendent of industrial relations at the Gramercy plant (App. 69); but Mr. English had no part in the negotiation of the 1974 agreement (App. 64-66, 83-84). Suffice it to say that the Union does not agree with this construction, and that the language of the agreement does not support it.

arguments on the basis of their conceptions of the "right" rather than on Congress' conception embodied in Title VII. This is particularly true of our co-petitioners' concession that "affirmative" quota programs designed to end racial segregation in a workforce violate Title VII. In making that concession, the Government offers no reason why the inference of § 703(j) that such programs are permissible should be rejected, nor does it cite any legislative history necessitating its concession. Instead it argues that *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) requires rejection of our position. (Govt. Br. 21). But as we showed in our opening brief (Un. Br. 23), the Court "emphasize[d]" in *McDonald* that it was not passing upon the "permissibility" of affirmative action programs "whether judicially required or otherwise prompted" (427 U.S. at 281, n. 8). And, the Company's 62 page brief does not even stop to consider the significance of § 703(j) or to cite a single word of the 1964 legislative history.

The repeated assertion of the other parties and many of the *amici curiae* that the 1964 legislative history provides little guidance on the question of the validity under Title VII of private quota programs to eliminate racial imbalance, is refuted by the wealth of legislative materials from the 1964 debates which bear on this question cited and discussed at Un. Br. 26-74. No party or *amicus curiae* has submitted any significant additional legislative materials as to the 1964 Congress' intent in enacting § 703.[5]

[5] The only argument respecting Congressional intent which was not fully anticipated in our opening brief is that proffered in the Amicus Curiae Brief of the California Correctional Officers Association: that, as § 703(i) expressly authorizes "preferential treatment" by "any business or enterprise on or near an Indian reservation . . . [in favor of] and individual because he is an Indian living on or near a reservation," and as Congress provided no other explicit authorization for preferences, an inference must be drawn that Congress intended to permit no other preferences. But this overlooks the quite different problem addressed in § 703(i). The preferences which Congress there authorized were not to eliminate imbalances under which Indians then suffered; on the contrary, Indians on or near reservations historically had been *favored* by the preferences there described, and the purpose of § 703(i) was to assure that that favored treatment could be continued, even to the point of permitting businesses on or near an Indian reservation to hire their entire workforce from Indians on or near that reservation. *Morton* v. *Mancari*, 417 U.S. 535 (1974). As we recognized in our opening brief (Un. Br. 20, and note 21), Congress intended its prohibitions against "discrimination" to reach practices which individuously favor one race at the expense of others even when whites are the victims, and but for § 703(i), these historical preferences for Indians would have fallen within that prohibition. The fact that Congress chose to include a special provision to enable a preference *perpetuating* racial imbalance hardly carries with it an inference that Congress would have thought it necessary to include a special provision in order to enable preferences *eliminating* imbalance.

There were, as we acknowledged, a few statements in the 1964 debates by liberals in the Senate, uttered prior to the addition of § 703(j), which could be understood to express an antipathy to quotas in any form, including privately-adopted quotas, and it is upon these statements, exclusively, that Respondent relies (Resp. Br. 78). But as we explained, to the extent these statements might be read as disapproving programs such as the one negotiated here,[6] they were not in the mainstream of the philosophy which guided Congress in shaping Title VII.

Respondent and our co-petitioners see the issue presented simply as how to reconcile two competing interests: the interest of black employees in securing jobs previous denied to blacks; and the interest of white employees in non-discriminatory treatment. As we showed in our opening brief, however, the 1964 Congress was concerned as well with a

[6] As stated in our brief (Un. Br. at 83-84), there is considerable reason to question whether these Senators would have disapproved the quota negotiated here—a quota which would furnish blacks the accelerated training which these Senators recognized as indispensable if Title VII is to achieve its purpose of eliminating the employment disadvantage suffered by blacks.

third interest: the preservation of management prerogatives and union freedoms to the maximum extent consistent with eradicating invidious discrimination. The accommodation of these interests was a judgment in favor of legislative restraint: quotas to eliminate racial imbalance were neither required nor forbidden. That resolution rested both on a recognition of the intrinsic difficulty, or at least the controversial nature, of legislating distributive justice, and on the limitist philosophy of government of the legislators holding the balance of power. Thus, the key Republican sponsors in the House made clear that "The Civil Rights Bill . . . does not in any way *require, reward,* or *encourage* . . . racial quotas or preferences in either private or public employment of individuals" (110 Cong. Rec. 6565, emphasis added). As one of these principal sponsors, Representative McGregor, explained moments before the final vote (110 Cong. Rec. 15893, emphasis added):

> "*Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.*
>
> "Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. *There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues* largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." (emphasis added)

These expressions, as we demonstrated in our opening brief, most clearly state the judgment of Congress in enacting Title VII in 1964—a judgment manifested in § 703(j) by the phrase shall not "require" rather than shall not "permit".

Nothing in any brief diminishes the force of these legislative materials. There is considerable discussion in the briefs of the other parties, and of many *amici curiae,* about Congress' post-1964 deliberations and actions.[7] But whatever the significance of those subsequent events to the question whether the Government can *impose* quotas—a question which the Court is not called upon to decide in the instant case (see Un. Br. at 76-83)—no-one suggests that Congress has, subsequent to 1964, evinced a hostility to privately adopted quotas to eliminate racial imbalance. Accordingly, if we are correct that Congress did not outlaw such quotas in 1964, nothing which has happened since could alter the construction of Title VII which we urge upon the Court.

III.

The justifications offered by our co-petitioners for a narrower construction of the right of private parties to adopt such quota selection programs are neither logical nor con-

[7] In *Teamsters* v. *United States,* 431 U.S. 324, 354 n. 39, the Court noted:

> the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

Teamsters thus recognizes that in Title VII cases, as in statutory cases generally (see, e.g., *Zuber* v. *Allen,* 396 U.S. 168, 185-86; *United States* v. *Wise,* 370 U.S. 405, 411-414; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 47-48), the meaning of legislation is to be determined from its language and legislative history rather than the uncertain inferences to be drawn from a subsequent Congress' failure to adopt proposed clarifying amendments. Guided by this principle which rests on the understanding that the law-making initiative is Congress' alone, in our opening brief we concentrated on the "intent of the Congress that enacted § 703 * * * in 1964," and reviewed the legislative history of the 1972 EEO Act only to show that it did not alter § 703 in any respect. (See pp. 74-76 of that brief).

sistent with the principles which guided Congress in Title VII.

The Government, Company, and numerous *amici curiae*, take as a given—without as we have already stated any support in the legislative history—that privately adopted quotas to eliminate segregation in the workforce violate the ban on employment discrimination in Title VII. Because they begin at that point, they find it necessary to construct rationales which would carve out from the area of prohibition some more limited zone of permissible private quota programs. As we explained in our opening brief (Un. Br. 78, n. 166), the positions urged by the Government and the Company "might jeopardize existing programs that USWA has negotiated throughout the steel, aluminum and can industries." Accordingly, we are compelled to note that having conceded away the direct route to upholding the program here at issue, they offer as substitutes convoluted routes which are without analytical or legislative support.

(1) *The Government*

The Government's alternative route is to argue that private parties may employ quotas as a "remedy" for their own real or "apparent" past discrimination. (Govt. Br. 35-42). Suffice it to say that, as we showed in our opening brief at 76-82, the lines which the Government attempts to draw are unconnected to any judgment made by Congress in shaping Title VII—indeed, are in conflict with the judgments which Congress *did* make. To that demonstration, we add here that even considered on its own terms the Government's rationale does not bear analysis. The bottom line of its argument is that employers and unions confronting the prospect that they may have discriminated in the past or may appear to have so discriminated, should be permitted to resolve their potential Title VII difficulties by adopting a "remedial" quota. But, in truth, such quotas neither remedy any discrimination that might have occurred nor resolve potential Title VII liabilities of the employer or union. Quota programs allocate employment opportunities

on the basis of race, not on the basis of status as a victim of past discrimination. By definition, such programs address the phenomenon of racial imbalance—the very phenomenon the Government says private parties may not address—they are not addressed to "making whole" the victims of past discrimination. The victims of the discrimination are by definition not the beneficiaries of the quota, except possibly by coincidence; and, the quota cannot cut off the rights of anyone who *was* a victim. If in fact Kaiser has discriminated against blacks in hiring craftsmen, the victims of that discrimination have available to them—and have had available to them for the past fourteen years—all the remedies provided by Title VII, and those remedies are wholly unaffected by the Kaiser-USWA quota selection program. Kaiser could not avoid its liability to an actual discriminatee by providing a quota preference to another person of the same race; its potential Title VII vulnerability, if any there be, is not diminished by the adoption of a quota selection program.[8]

Thus, the multi-sided debate, incidental to the Government's theory, as to whether, contrary to the findings of the courts below, Kaiser has engaged in prior discrimination

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[8] While not relieving the employer of any potential liability with respect to aggrieved black employees, the adoption of an affirmative quota program would, on the Government's understanding of § 703, open the employer to potential liability to white employees. The Government asserts that the employer might have refuge from claims by whites by virtue of the Equal Employment Opportunity Commission's (EEOC's) Guidelines which set "standards for the approval of voluntary affirmative action programs under Section 713(b)(1) . . ." (Govt. Br. 40). But even assuming refuge may be established in that fashion, careful reading of those Guidelines reveals that their shelter would extend only to those employers who, when confronted with a charge of discrimination by whites, are willing to come forward with evidence which could be used by the EEOC to institute or prosecute a charge against the employer for discriminating against blacks. See Guidelines, §§ 1608.1(d), 1608.2, and 1608.11.

of one type or another against blacks, or whether there is a *prima facie* showing of such discrimination on this record, is beside the point. Proof that Kaiser has or has not discriminated against blacks belongs in a case where it is contended that one or more black persons are the victims of such discrimination and should therefore be granted a remedy. That proof has nothing to do with a quota program not designed in the first place to remedy any such discrimination. The connection which these various briefs make between the two issues is without any analytical foundation.[9]

Further, we cannot help but observe that the Government's argument, by hinging the right of private parties to adopt quota programs on a showing of real or apparent past discrimination, would make culprits of forward-looking employers and unions while protecting only past sinners. Major segments of American industry have already adopted quota selection programs, unaware of the limitations the Government has lately suggested apply to their right to do so. Only by fabricating real or apparent cases against themselves can they, under the Government's theory, justify what they have already done. And employers and unions that could not show themselves to have been real or apparent past sinners would be precluded from establishing new affirmative action programs unless they were prepared first to commit some real or apparent sins. When such results flow from a concocted rationale rather than a Congressional judgment they are particularly intolerable. Congress did not draw the lines the Government presses upon this Court.

The Congress which enacted Title VII understood that the racial discrimination pervading all facets of American

[9] The same fallacy inheres in the assertion in numerous *amicus curiae* briefs that somehow an indispensible party is missing in this case: the blacks who have been victims of Kaiser's discrimination. As stated in the text, if there be any such victims, the USWA-Kaiser quota program does not affect in any respect their right to pursue their remedies under Title VII.

society—not simply the workplace itself—accounted for the present disadvantage suffered by blacks in employment.[10] While Title VII *mandated* only cures for *employment* discrimination, it is no violation of Congressional intent for employers and unions to address a principal consequence of "external" discrimination—the *de facto* segregation of their workforces. Congress has not condemned the private acceleration of an end to the legacy of the ugliest page in our Nation's history; and employers and unions who are anxious to undertake the task should not be required to manufacture or hypothesize pretextual past sins of their own as the price for doing so.

(2) *The Company*

The Company offers an additional alternative route: that private parties may adopt quotas in response to identifiable discrimination which may be "external" to the workplace but which nevertheless affects the composition of their workforce. (Co. Br. 46-49). The Company has focused on a consideration which was voiced by all of the sponsors in the debates over Title VII, but, we believe, has drawn the wrong conclusion. Time and again the sponsors articulated the reasons why blacks did not enjoy equal status in the workplace: in part because of employment discrimination, but also in part because of discrimination in education, in job training and so on.[11] While Congress recognized that blacks would not achieve equity in the workplace simply from an end to employment discrimination,[12] Title VII was aimed at that one cause of disadvantage. And, as § 703(j) makes plain, Congress declined to place an affirmative duty on employers and unions to address the effects on their workforces resulting from external societal discrimination. But, at the same time, as we documented in our opening brief, Con-

[10] See nn. 11 and 12, *infra*.

[11] See, e.g. 110 Cong. Rec. 6547, 6548 (Senator Humphrey); *id.* at 7204 (Senator Clark); *id.* at 7241 (Senator Case); *id.* at 6562 (Senator Kuchel).

[12] *Ibid.* See also, statements cited at Un. Br. 83-84.

gress chose *not* to *legislate a prohibition* against employers and unions taking affirmative steps to accelerate the progress of blacks to equity in the workplace.

It therefore makes no sense to conclude, as the Company does, that Congress intended to require employers and unions to *prove* by *record evidence* in each case in which a quota is challenged the discrimination (whether "internal" or "external") that in fact explains the racial imbalance in their particular workforce. Congress believed discrimination of one kind or another was the pervasive cause of such imbalances. The Congressional judgment, based in part upon that belief, was to leave the subject of affirmative action by private parties *unregulated*, not to regulate it by requiring in every case that Congress' belief be reconfirmed.[13]

CONCLUSION

As the many briefs filed in this case suggest, there are widely divergent views as to the desirability of private affirmative action, and as to its appropriate limits, if any. To date, Congress has not opted to evaluate affirmative quota selection programs and/or to draw distinctions between them.[14] Its decision in 1964 was to leave this matter where it then was: in the hands of private employers and unions. If Congress becomes dissatisfied with actions taken in the private sector, it is free at any time to legislate the necessary restrictions. Should Congress undertake to do

[13] Nor is it conceivable that Congress could have intended that an employer, a union, and the employer's employees would litigate the existence or non-existence of discrimination by parties wholly outside the lawsuit; here, e.g., the institutions in Louisiana which provided craft training prior to 1974.

[14] Whatever one's assessment of the 1964 legislative history recounted in USWA's opening brief, this much is clear: Congress did not focus upon the pros and cons of private affirmative action plans, and thus could not have reached a judgment as to their *desirability*. The lesson we have drawn from that legislative history is not that Congress *endorsed* such plans, but only that it elected not to prohibit them.

so, it will be in a position (as this Court is not) to draw prudential lines between those instances in which private quotas to end racial imbalance are desirable and those in which they should be prohibited. It is readily apparent that the many possible dividing lines which the other parties and the *amici curiae* proffer in this case between permissible and impermissible affirmative action have no root in the existing statute, and simply reflect the views of the various authors and interest groups as to what the line ought to be. But the decision whether to draw a line, and if so what line, is for Congress to make, and this Court should not usurp that function. Therefore we do not invite this Court to "legislate" a set of rules to resolve the dilemma identified in our opening brief (Un. Br. 14). We urge only that the Court recognize that "Congress' policy has not yet moved to that point" (*Labor Board* v. *Insurance Agents*, 361 U.S. 477, 500 (1960)).

The decision and judgment below should be reversed.

Respectfully submitted,

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